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Antah Schindler Sdn Bhd v Maju Holdings Sdn Bhd

B HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24C-93–04 OF 2022
ALIZA SULAIMAN J
22 NOVEMBER 2022

C *Adjudication — Construction Industry Payment and Adjudication Act 2012 ('CIPAA') — Direct payment from principal — Party against whom plaintiff had obtained adjudication decision ('AD') failed to pay adjudicated amount — Whether plaintiff had satisfied conditions under s 30 of CIPAA for Court to order principal/employer of construction project to pay the adjudicated amount* D *directly to plaintiff — Whether the words 'adjudicated amount' in s 30(1) and (3) of CIPAA did not include interest on the adjudicated amount nor the adjudication costs*

E The plaintiff was appointed by GBC as a subcontractor in a construction project. The plaintiff commenced adjudication proceedings against GBC under the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA') and obtained a ruling that GBC pay it the adjudicated amount of RM3,430,377.67 together with: (a) interest at the rate of 7.90%pa on the sum of RM927,037.02 calculated from 20 October 2018 until that sum was fully F paid up; (b) interest at the rate of 5%pa on the sum of RM2,361,642.12 calculated from 24 February 2019 until that sum was fully paid up; and (c) costs of the adjudication proceedings amounting to RM81,896.90. The High Court allowed the plaintiff to enforce the adjudication decision ('AD') but GBC failed to make payment. As a result, the plaintiff filed the instant G application under ss 30 and 31 of the CIPAA for an order that the defendant as the principal/employer of the construction project pay the amounts stated in the AD directly to the plaintiff.

H **Held**, ordering the defendant to pay directly to the plaintiff only the adjudicated amount of RM3,430,377.67 plus costs of RM8,000 subject to allocatur:

(1) The plaintiff had on balance of probabilities satisfied the conditions under s 30 of the CIPAA for the court to order the defendant to make I direct payment of the adjudicated amount to the plaintiff (see paras 16–25).

(2) The words 'adjudicated amount' in s 30(1) and (3) of the CIPAA did not include interest on the adjudicated amount nor the costs of the adjudication proceedings. If Parliament had intended that the principal

should pay not merely the adjudicated amount but also interest and costs, it would have expressly provided as such (see paras 26 & 30).

[Bahasa Malaysia summary

Plaintif telah dilantik oleh GBC sebagai subkontraktor dalam projek pembinaan. Plaintif memulakan prosiding adjudikasi terhadap GBC di bawah Akta Pembayaran dan Adjudikasi Industri Pembinaan 2012 ('CIPAA') dan memperoleh penghakiman bahawa GBC membayarnya amaun adjudikasi sebanyak RM3,430,377.67 berserta: (a) faedah pada kadar 7.90% setahun pada jumlah RM927,037.02 yang dikira dari 20 Oktober 2018 sehingga jumlah tersebut dibayar sepenuhnya; (b) faedah pada kadar 5% setahun ke atas jumlah RM2,361,642.12 yang dikira dari 24 February 2019 sehingga jumlah tersebut dibayar sepenuhnya; dan (c) kos prosiding adjudikasi berjumlah RM81,896.90. Mahkamah Tinggi membenarkan plaintif menguatkuasakan keputusan adjudikasi ('AD') tetapi GBC gagal membuat pembayaran. Akibatnya, plaintif memfailkan permohonan semasa di bawah ss 30 dan 31 CIPAA untuk perintah supaya defendan sebagai prinsipal/majikan projek pembinaan membayar jumlah yang dinyatakan dalam AD terus kepada plaintif.

Diputuskan, memerintahkan defendan membayar terus kepada plaintif hanya jumlah yang diadili sebanyak RM3,430,377.67 campur kos RM8,000 tertakluk kepada alokatur:

(1) Plaintif mempunyai imbangan kebarangkalian memenuhi syarat di bawah s 30 CIPAA untuk Mahkamah memerintahkan defendan membuat pembayaran terus amaun yang diadjudikasi kepada plaintif (lihat perenggan 16–25).

(2) Perkataan 'amaun yang diadjudikasi' dalam s 30(1) dan (3) CIPAA tidak termasuk faedah ke atas amaun yang diadjudikasi mahupun kos prosiding adjudikasi. Jika Parlimen berhasrat bahawa prinsipal perlu membayar bukan sahaja jumlah yang diputuskan tetapi juga faedah dan kos, ia akan dengan jelas memperuntukkan sedemikian (lihat perenggan 26 & 30).]

Cases referred to

Antah Schindler Sdn Bhd v Golden Base Construction Sdn Bhd & another case [2020] MLRHU 891, HC (refd)

Bond M&E Sdn Bhd v Pali PTP Sdn Bhd [2022] 11 MLJ 58; [2022] 5 MLRH 279, HC (refd)

Peck Chew Piling (M) Sdn Bhd v Panzana Enterprise Sdn Bhd [2022] MLJU 390; [2022] 5 MLRH 423, HC (refd)

Cabnet Systems (M) Sdn Bhd v Dekad Kaliber Sdn Bhd & Anor [2020] MLJU 311; [2020] 1 LNS 187, HC (refd)

Chong Lek Engineering works Sdn Bhd v PFCE Integrated Plant and project Sdn Bhd and another case [2020] MLJU 2389; [2020] 1 LNS 2251, HC (refd)
Glocal Tech Engineering Sdn Bhd v Panzana Enterprise Sdn Bhd [2021] MLJU 474; [2021] MLRHU 2546, HC (distd)
HMN Nadhir Sdn Bhd v Jabatan Kerja Raya Malaysia & Ors [2018] MLJU 1859; [2018] 1 LNS 1938, HC (refd)
WTK Engineering Sdn Bhd v Seriemas Development Sdn Bhd [2021] MLJU 520; [2021] MLRHU 2420, HC (refd)
HSL Ground Engineering Sdn Bhd v Civil Tech Resources Sdn Bhd and another case [2021] 8 MLJ 347; [2020] 1 LNS 526, HC (refd)
PCom Pacific Sdn Bhd v Apex Communications Sdn Bhd & Anor [2020] MLJU 118; [2020] 1 LNS 130, HC (refd)
Zeta Letrik Sdn Bhd v JAKS Island Circle Sdn Bhd [2022] MLJU 392; [2022] 1 LNS 427, HC (refd)

Legislation referred to

Construction Industry Payment and Adjudication Act 2012 ss 4, 15, 16, 28, 30, 30(1), (2), (3), (4), (5), 31
Rules of Court 2012 O 5, O 7, O 28, O 69A, O 92 r 4

Deepak Mahadevan (with Faeza Suraya bt Roselan) (Azmi Fadzly Maha & Sim) for the plaintiff.
Sachpreetraj Singh Sohanpal (with Pavithra Loganathan) (Raj & Sach) for the defendant.

Aliza Sulaiman J:

INTRODUCTION

[1] This is an application by the plaintiff, vide the originating summons ('OS') dated 21 April 2022 for the defendant to make direct payment to the plaintiff according to the adjudication decision dated 19 August 2019 ('AD') by the learned adjudicator Mr Michael Teo Seng Siong ('adjudicator') in the adjudication proceedings between the plaintiff and Golden Base Construction Sdn Bhd ('GBC') pursuant to the Construction Industry Payment and Adjudication Act 2012 (Act 746) ('the CIPAA'). In the intitulement of the OS, the plaintiff had cited ss 30 and 31 of the CIPAA and O 5, O 7, O 28, O 69A and/or O 92 r 4 of the Rules of Court 2012 ('the ROC 2012').

[2] In the OS, the plaintiff prayed for the following main orders to be made:

1. That the defendant shall make direct payment to the plaintiff according to the AD as follows:

(a) the sum of RM3,430,377.67 as the principal adjudicated amount;

(b) interest at the rate of 7.90% per annum on the sum of RM927,037.02 calculated from 20.10.2018 until the sum of RM927,037.02 is paid in full;

(c) interest at the rate of 5% per annum on the sum of RM2,361,642.12 calculated from 24.2.2019 until the sum of RM2,361,642.12 is paid in full; and

(d) the sum of RM81,896.90 being the costs of the adjudication proceedings; and

2. that the defendant shall pay costs to the plaintiff for the proceedings.

[3] After hearing oral submissions by the learned counsels who represented the parties on 29 August 2022 and having considered the cause papers and both the oral and written submissions, the court had, on 30 August 2022, allowed only the prayers in subpara 1(a) and para 2 of the OS namely, for the defendant to make direct payment of the principal adjudicated amount of RM3,430,377.67 to the plaintiff together with costs of RM8,000, subject to allocatur.

[4] Both the plaintiff and the defendant have lodged their appeals; the plaintiff with regards to the decision where the court did not include interest and cost as per the AD to form part of the amount which is to be paid directly by the defendant to the plaintiff; and the defendant, as to the entire decision. Hereinbelow are my full grounds of judgment.

THE CAUSE PAPERS

[5] The cause papers filed in respect of the plaintiff's application, apart from the OS, are as follows:

(a) the plaintiff's affidavit in support ('AIS') affirmed by its Head of Commercial, Mr Tan Wei Heong on 21 April 2022 (encl 2);

(b) the defendant's affidavit in reply ('AIR') affirmed by its Group Chief Executive, Mr Mohamed Roslan bin Mohamed Shariff on 25 May 2022 (encl 5);

(c) the plaintiff's AIR affirmed by the same deponent on 8 June 2022 (encl 6); and

(d) the defendant's supplemental affidavit affirmed by the same deponent on 27 July 2022 (encl 7).

BACKGROUND FACTS

[6] By way of a letter of award dated 25 April 2018 ('LoA'; exh 'TWH1' in the AIS, encl 2), the plaintiff was appointed by GBC as the subcontractor for

A the supply, delivery, installation, testing, commissioning and maintenance of lift and escalator services ('works') for the project known as 'Cadangan Pembangunan Perdagangan Bercampur Yang Mengandungi 1 Blok Menara Pejabat 29 Tingkat (Menara 1), 6 Blok Bangunan Pejabat 7 Tingkat (Menara 2–7) Yang Mengandungi Tingkat Separa Bawah 1 (LG1), Tingkat Separa
B Bawah 2 (LG2) Dan Tingkat Bawah (GF), Tingkat 1–7 Ruang Pejabat Dan Komersil, 1 Tingkat Basemen Ruang Letak Kereta Di Atas Lot PT 35763 Dan Lot PT 35764, Bandar Tasik Selatan, Mukim Petaling, Kuala Lumpur Untuk Tetuan ASM Development Sdn Bhd' ('project') for the fixed lump sum of
C RM4,523,417.12.

[7] The plaintiff commenced adjudication proceedings against GBC by way of a notice of adjudication dated 27 March 2019 claiming for the total amount outstanding of RM3,430,377.67 consisting of the sum of:

D (a) RM2,503,340.65 being the total value of work done by the plaintiff under the subcontract which was previously awarded to it by Lai Engineering Sdn Bhd ('LESB'). According to the payment claim dated 5 March 2019, LESB's contract as the main contractor was terminated by ASM Development Sdn Bhd ('ASM') as the employer and after the
E termination, but before the issuance of the LoA, a joint inspection was carried out and the works done by the plaintiff was inspected and verified by GBC and ASM; and

(b) RM927,037.02 as the uncertified amount for works done
F (see exh 'TWH2', encl 2 and 'TWH10', encl 6).

[8] The adjudication proceedings ended in the plaintiff's favor (see the AD in exh 'TWH3'). The adjudicator decided that the principal adjudicated amount together with interest and costs shall be paid in full by GBC to the
G plaintiff by way of a bank draft within 14 days from the date of the AD. However, no payment was forthcoming from GBC.

[9] What followed was the common scenario of the plaintiff applying to the High Court to enforce the AD pursuant to s 28 of the CIPAA whilst GBC
H applied to set aside and stay the AD under ss 15 and 16 of the CIPAA. This court had, on 8 January 2020, allowed the plaintiff's application and dismissed GBC's applications (see exh 'TWH4' and *Antah Schindler Sdn Bhd v Golden Base Construction Sdn Bhd & Another Case* [2020] MLRHU 891). GBC's appeals to the Court of Appeal against the decisions by this court were
I dismissed on 25 May 2021 with costs of RM5,000 subject to the payment of the allocatur fee (see exh 'TWH5').

[10] The plaintiff averred that it has commenced proceedings to enforce the orders made by this court, but no payment has been made by GBC as per the

AD. It was further averred that throughout the adjudication proceedings, both parties had taken the position that ASM is the principal and/or employer of the project (see paras 14 and 16 of the AIS).

[11] On this basis, the plaintiff had issued the notice for direct payment and the revised notice of the same to ASM on 12 September 2019 and 17 September 2019, respectively (see exh 'TWH6'). ASM did not respond to these notices.

[12] The plaintiff then filed OS No WA-24C-94–07 of 2021 against ASM on 9 July 2021 pursuant to s 30 of the CIPAA (see exh 'TWH7'). In resisting this application, ASM alleged that the real principal of the project was the defendant and not ASM. As ASM did not exhibit any document to support its allegation, the Construction Court 1 in Kuala Lumpur had, on the hearing date on 10 December 2021, directed ASM to file an additional affidavit to prove its assertion.

[13] On 18 December 2021, ASM duly filed the additional affidavit wherein its contract with the defendant was exhibited. Having perused this contract, on 6 January 2022, the plaintiff withdrew its s 30 of the CIPAA application against ASM and the Construction Court 1 recorded this fact subject to the condition that the same application shall not be filed against ASM. Cost of RM500 was also ordered to be paid by the plaintiff to ASM subject to the allocatur fee and the plaintiff was given the liberty to proceed with its application for direct payment against the defendant (see exh 'TWH7').

[14] This resulted in the present application before this court pursuant to ss 30 and 31 of the CIPAA which provides as follows:

> 30 Direct Payment from principal
>
> (1) If a party against whom an adjudication decision was made fails to make payment of the adjudicated amount, the party who obtained the adjudication decision in his favour may make a written request for payment of the adjudicated amount direct from the principal of the party against whom the adjudication decision is made.
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> (2) Upon receipt of the written request under subsection (1), the principal shall serve a notice in writing on the party against whom the adjudication decision was made to show proof of payment and to state that direct payment would be made after the expiry of ten working days of the service of the notice.
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> (3) In the absence of proof of payment requested under subsection (2), the principal shall pay the adjudicated amount to the party who obtained the adjudication decision in his favour.

(4) The principal may recover the amount paid under subsection (3) as a debt or set off the same from any money due or payable by the principal to the party against whom the adjudication decision was made.

(5) This section shall only be invoked if money is due or payable by the principal to the party against whom the adjudication decision was made at the time of the receipt of the request under subsection (1).

31 Concurrent Exercise of Remedies

(1) Unless a stay is granted under section 16, a party who obtained an adjudication decision in his favour may exercise any or all of the remedies provided in this Act concurrently to enforce the adjudication decision.

(2) The remedies provided by this Act are without prejudice to other rights and remedies available in the construction contract or any written law, including any penalty provided under any written law.

THE PLAINTIFF'S CONTENTIONS

[15] The plaintiff's counsel submitted that the plaintiff has satisfied all four conditions under s 30 of the CIPAA as elucidated in the decisions of the High Court in *Cabnet Systems (M) Sdn Bhd v Dekad Kaliber Sdn Bhd & Anor* [2020] MLJU 311; [2020] 1 LNS 187, *Bond M&E Sdn Bhd v Pali PTP Sdn Bhd* [2022] 11 MLJ 58; [2022] 5 MLRH 279 and *Zeta Letrik Sdn Bhd v JAKS Island Circle Sdn Bhd* [2022] MLJU 392; [2022] 1 LNS 427. After scrutinising the affidavit evidence and the submissions of the parties, I was inclined to agree with the plaintiff that it has established three conditions for reasons which shall be explained in the following para and the only issue which requires a more detailed analysis is as to whether there is any money due or payable by the defendant to GBC at the time of receipt of the request under sub-s 30(1) of the CIPAA. The fact that the defendant is the 'principal' within the meaning of s 4 of the CIPAA is not disputed by the defendant.

[16] It is my considered view that the plaintiff has proven the following conditions on a balance of probabilities:

(a) that GBC has failed to make payment of the adjudicated amount to the plaintiff. The defendant's only retort was that, with reference to the case authorities of *Chong Lek Engineering works Sdn Bhd v PFCE Integrated Plant and project Sdn Bhd and another case* [2020] MLJU 2389; [2020] 1 LNS 2251, *Bond* and *Zeta Letrik* , the plaintiff's claim is erroneous as the plaintiff has no legal basis in demanding that the defendant takes responsibility for the payment of interest and cost as decided by the adjudicator and reflected in the prayers in subparas 1(b) to (d) of the OS;

(b) with respect, the defendant's argument merely goes to the amount of direct payment which ought to be made by the defendant to the plaintiff upon a case being proven under s 30 of the CIPAA. If the plaintiff is

successful in establishing all the requirements for an order for direct payment to be made by the defendant to the plaintiff then, following the earlier decisions of this court in *Bond*, *Peck Chew Piling (M) Sdn Bhd v Panzana Enterprise Sdn Bhd* [2022] MLJU 390; [2022] 5 MLRH 423 and *Zeta Letrik*, (as at the date of writing this grounds of judgment, the appeals against the decision in these cases have yet to be heard), this court would allow direct payment of only the principal adjudicated amount minus the element of interest and cost;

(c) that the plaintiff has made a written request to the defendant vide the letter dated 12 January 2022 to pay the adjudicated amount directly to the plaintiff ('said request'; see sub-s 30(1) of the CIPAA and exh 'TWH8'). The defendant had acknowledged receipt of the said request on 13 January 2022 and admitted to receiving the same (see para 9, encl 5); and

(d) that the defendant has not complied with the said request and no payment was made by the defendant to the plaintiff according to the terms of the AD.

[17] Having proven the conditions as afore stated, the evidential burden shifts to the defendant to prove that there is no sum due or payable at the time the defendant received the said request (see *Chong Lek Engineering works* and *Zeta Letrik*). However, before proceeding with the analysis on this issue, it must be mentioned that the plaintiff had drawn the attention of the court to the fact that the defendant has not issued the notice under sub-s 30(2) of the CIPAA.

[18] That provision imposes a mandatory obligation on the defendant to issue a written notice to GBC requesting proof of payment to the plaintiff, failing which the defendant is compelled to make direct payment to the plaintiff after the expiry of ten working days of the service of such notice (see *HMN Nadhir Sdn Bhd v Jabatan Kerja Raya Malaysia & Ors* [2018] MLJU 1859; [2018] 1 LNS 1938). In its AIR, the defendant did not exhibit any notice which was sent to GBC in accordance with sub-s 30(2) of the CIPAA.

[19] The consequences of the failure to send the above said mandatory notice has been repeatedly addressed in previous cases such as *PCom Pacific Sdn Bhd v Apex Communications Sdn Bhd & Anor* [2020] MLJU 118; [2020] 1 LNS 130, *HSL Ground Engineering Sdn Bhd v Civil Tech Resources Sdn Bhd and another case* [2021] 8 MLJ 347; [2020] 1 LNS 526, *Bond*, *Peck Chew Piling* and *Zeta Letrik*, namely that it would be fatal to the defence that there is no money due or payable by the defendant to GBC at the time of the receipt of the said request. Further, based on sub-s 30(3) of the CIPAA, in the absence of proof of payment as requested under sub-s 30(2) of the CIPAA, the defendant has no choice but is compelled to pay the adjudicated amount to the plaintiff.

First issue: Whether there is money due or payable by the defendant to GBC on the date when the defendant received the said request ie 13 January 2022

[20] Subsection 30(5) of the CIPAA clearly states that s 30 shall only be invoked if money is due or payable by the principal to the party against whom the adjudication decision was made at the time of the receipt of the request under sub-s 30(1) of the CIPAA (for the meaning of the words 'due or payable', see among others, *HSL Ground Engineering*, *Chong Lek Engineering* and *WTK Engineering Sdn Bhd v Seriemas Development Sdn Bhd* [2021] MLJU 520; [2021] MLRHU 2420 (the appeal against the decision of this court was dismissed on 18 May 2022)).

[21] The defendant submitted that the plaintiff had failed to fulfil the condition in sub-s 30(5) of the CIPAA as there were no sums payable by the defendant to GBC when the defendant received the said request. The defendant relied on its letter to the plaintiff dated 26 January 2022 (exh TWH8') in response to the said request where the defendant had quoted cl 1.1 of the Conditions of Contract ('CoC') under the 'Agreement And Conditions Of PAM Contract 2006 (Without Quantities)' ('PAM Contract') between itself and GBC, and stated that GBC had suspended, and had not completed, the works. The defendant further stated that this amounts to a breach of contract by GBC and the defendant was thus entitled to exercise its rights under, or to invoke, cl 18.2 (that GBC shall be liable and shall indemnify the defendant against any damage, expense, liability, loss, claim or proceedings due to any negligence, omission, default and/or breach of contract by GBC), cl 22.1 (on liquidated damages for delay in the completion of the works), cl 25.1 (determination of GBC's employment by the defendant), cl 25.3 (automatic determination of GBC on the ground of insolvency, winding up etc), cl 25.4(b) (assignment of any agreement for the supply of materials, goods etc. by GBC to the defendant), cl 25.4(d) (GBC's liability to pay the defendant for all cost incurred to complete the works), cl 25.6 (submission of a final account after completion of the works) and cl 30.4 (the defendant's entitlement to set off) of the CoC.

[22] In exh 'MR2' of its AIR (encl 5), the defendant had exhibited, among others:

(a) its letter dated 21 September 2018 to GBC requesting for relevant documents to substantiate the works done by GBC for verification for purposes of the progress payment. The letter also serves to put on record the fact that GBC has stopped the works since 7 August 2018 and that the defendant will hold GBC responsible for the consequential damages due to the suspension of work without any written notice. GBC was advised to 'recommend the work and arrange JKKP inspection without any further delay'; and

(b) a table which purportedly shows the 'kos perbelanjaan bagi projek termasuk kos pembayaran kepada pihak-pihak pembekal yang terpaksa ditanggung Defendan apabila GBCSB meninggalkan/berhenti menjalankan kerjanya'. In para 14 of the same AIR, the defendant reserved its right to produce the documents referred to in the said table and vide encl 7 (which was not objected to by the plaintiff at the hearing), the defendant produced the following documents as exh 'MR1' to support its contention that there are no monies to be paid to the plaintiff as a result of GBC's non-compliance in the performance of the works:

(i) the defendant's letter to GBC dated 9 September 2019 referring to the defendant's earlier letter dated 21 September 2018 and giving GBC 14 days' notice to recommend the work and to carry out JKKP inspections of the lift, failing which the defendant shall exercise its contractual right as per the PAM Contract;

(ii) the defendant's letter to GBC dated 21 January 2020 titled 'NOTICE OF DEFAULT' with reference to the defendant's earlier letter dated 7 March 2019, a copy of which was *not* exhibited, and stating as follows:

> Based on latest program at site and lift installation JKKP inspection still not carried out, as such with reference to clause 25.2, of the PAM 2006, we hereby write to issue you notice of default for the followings:-
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> (1) Without reasonable cause you wholly and substantially suspends the carrying out of the works before completion.
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> (2) Fails to proceed regularly with the works You must to remedy and rectify the above defaults within 14 days. If you fail to rectify the abovementioned defaults within 14 days from your receipt of this notice, we shall exercise our rights under clause 25 of the PAM Contract 2006 to determine your employment and/or to carry out the works ourself and shall bill you to all the cost incurred; and

(iii) GBC's letter to the defendant dated 4 April 2022 (which is after 13 January 2022) titled 'REQUEST FOR TIME EXTENSION' with reference to the defendant's letter as mentioned in subpara (b)(ii) above wherein GBC informed that it was undergoing reshuffling and restructuring and will try to rectify the issues as stated in the defendant's letter. GBC admitted that it was 'delayed and held back due to MCO that lasted more than two years' and hoped to have the defendant's understanding and requested 'for more time to take remedy action as soon as possible'.

[23] The defendant's counsel vehemently argued that the plaintiff lacks knowledge on the work status between the defendant and GBC and the

affidavit evidence shows that GBC's suspension of the works had caused the defendant to incur significant expenses and that there are breaches of contract by GBC which entitles the defendant to a right to set off pursuant to cl 30.4 of the CoC. It was further submitted that the defendant would suffer extreme prejudice if it was ordered to make direct payment to the plaintiff under these circumstances as the full extent of expenses incurred can only be determined upon the preparation and issuance of the final account.

[24] The court has given careful consideration to the defendant's averments and submissions and finds that the defendant has not adduced sufficient evidence to discharge the evidential burden to prove that there is no money due or payable to GBC as at 13 January 2022 for the following reasons:

(a) cl 13 of the letter of award between the defendant and GBC dated 19 April 2017 (exh 'MR2', encl 5) provides that the said letter shall constitute a legal and binding contract pending formal signing of the 'Contract Documents'. The defendant contended that the 'Contract Documents' here means the PAM Contract. However, the PAM Contract as shown in exh 'MR1', encl 5 was not signed by the parties. As the defendant has not proven that the 'Contract Documents' have been formally signed, the contract which binds the defendant and GBC is the letter of award;

(b) assuming that I am wrong in my conclusion as stated in subpara (a) above, and the PAM Contract is applicable by the conduct of all the parties in the chain of contracts who have seemingly accepted the same throughout their transactions as submitted by the defendant's counsel:

(i) there is no evidence of any determination of GBC's employment by the defendant to enable the defendant to invoke cl 25.4 CoC; and

(ii) the defendant has not shown that it is entitled to set off under any of the cll mentioned in cl 30.4 CoC and that subparas (a) and (b) under cl 30.4 have been fulfilled. For ease of reference, the salient part of cl 30.4 CoC is re-produced below:

> The Employer shall be entitled to set off all cost incurred and loss and expense where it is expressly provided under Clauses 2.4, 4.4, 5.1, 6.5(e), 6.7, 14.4, 15.3(b) 15.3(c), 15.4, 15.5, 19.5 and 20.A March No set off under this clause may be made unless:
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> 30.4(a) the Architect (on behalf of the Employer) has submitted to the Contractor complete details of their assessment of such set off; and
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> 30.4(b) the Employer or the Architect on his behalf has given the Contractor a written notice delivered by hand or by registered post, specifying his intention to set off the amount and the grounds on which such set off is made. Unless expressly stated elsewhere, such written notice shall be given not later than twenty eight (28) Days before any set

off is deducted from any payment by the Employer. ...'. A

(iii) the defendant has not exhibited any letter, notice or demand which it had sent to GBC in the exercise of any common law right to set off;

(iv) the letters as set out in para 22(b)(i), (ii) and (iii) above do not give a full picture of the events which had transpired between the defendant and GBC such that is incontrovertible that there is no money due or payable by the defendant to GBC as at 13 January 2022; B C

(v) the table as mentioned in para 22(b) above is illegible and the defendant did not, in its affidavit, seek to explain the particulars in the table. Hence, the table does not assist to support or prove the defendant's alleged expenses to the suppliers as a consequence of GBC's suspension of the works; D

(vi) even though the final account has not been issued, it was still incumbent on the defendant to adduce adequate evidence to discharge the evidentiary burden of proof such that it can be concluded that there is no money due or payable by the defendant to GBC as at 13 January 2022; and E

(vii) the case of *Glocal Tech Engineering Sdn Bhd v Panzana Enterprise Sdn Bhd* [2021] MLJU 474; [2021] MLRHU 2546, which was decided by this court and cited by the learned counsel for the defendant to support the argument that the defendant had similarly utilised the defence of set off upon receiving the said request, can be distinguished on its facts. In *Glocal Tech Engineering*, apart from the notice of default, the certificate of non-completion and the notice of termination were issued by the employer to the main contractor, and these were part of the affidavit evidence. In addition, the employer had filed a counterclaim in the civil suit which was brought by the main contractor against the employer. In stark contrast, the contemporaneous and other documents produced by the defendant in the instant suit are simply insufficient. F G H

[25] In the premises, there was only one order that could justifiably be made and that is to allow the plaintiff's application I

Second issue: Whether interest on the adjudicated amount and adjudication costs as per the ad should form part of the sum which is to be paid directly by the defendant to the plaintiff

[26] This court had first analysed the issue as to whether the term 'adjudicated amount' in s 30 of the CIPAA includes interest and costs as awarded in the adjudication decision in *Bond*'s case. I went on to hold that the words 'adjudicated amount' in sub-s 30(1) and (3) of the CIPAA do not include interest on the adjudicated amount and the adjudication costs. My reasoning is set out in paras 33–48 of the judgment and for the sake of brevity, shall not be repeated here.

[27] I have maintained this view in the subsequent cases on s 30 of the CIPAA including *Peck Chew Piling* and *Zeta Letrik*. Being fully aware of this position, Mr Deepak attempted to dissuade the court from applying its earlier opinion on the matter by submitting, based on the case authority of *HMN Nadhir*, that the direct payment mechanism governed by s 30 of the CIPAA was designed to be mandatory instead of discretionary in order to protect the interest of smaller contractors with the aim of facilitating speedy payment for work done. The learned counsel posited that the only interpretation of s 30 that would be aligned with the objective of CIPAA is to grant to the subcontractor all the sums awarded in an adjudication decision.

[28] Mr Deepak accentuated the plight of subcontractors and smaller contractors who are not paid and will inevitably be confronted with the reality of having insufficient funds to maintain their business operations. This will force them to seek alternative financial sources such as borrowing facilities from financial institutions, and inevitably lead to interest and costs over and above their existing financial difficulties. It was also stressed that claimants who are forced to resort to the CIPAA to recover money will incur legal costs which would not be necessary had they been paid on time. The learned counsel opined that to omit interest and costs from the sums to be directly paid by the defendant to the plaintiff would essentially allow the defendant to benefit from its non-payment to GBC.

[29] In any event, the plaintiff emphasised that the defendant can still recover the amount paid pursuant to a direct payment order under sub-s 30(4) of the CIPAA as an independent debt or set off from GBC, including the interest and costs awarded in the AD. The word 'debt' was contended to be much wider and covers amounts like interest and costs in the AD.

[30] The court acknowledges that the plaintiff has correctly described the purpose and objective of s 30 of the CIPAA. However, the conclusion in *Bond*'s case was arrived at as a matter of statutory interpretation of the different words

which are used repeatedly in the CIPAA such as 'adjudication decision', 'adjudicated amount', 'interest' and 'costs' and it was found that the legislature must have intended for these words to refer to different things. Basically, if Parliament had intended for a principal to pay not merely the adjudicated amount, but interest and costs as well, nothing would be easier than to expressly provide as such.

[31] In the upshot, I remain unconvinced that the words 'adjudicated amount' in sub-s 30(1) and (3) of the CIPAA ought to include interest on the adjudicated amount and the adjudication costs.

CONCLUSION

[32] Based on the foregoing considerations, the plaintiff's application to the extent of prayers 1(a) and 2 of the OS was allowed with costs of RM8,000, subject to allocatur. Unless and until the Court of Appeal decides otherwise, this court will have to maintain a consistent position in not allowing interest and cost as per the AD to form part of the amount which is to be paid directly by the defendant to the plaintiff.

Order accordingly.

Reported by Ashok Kumar